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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/808,235	03/24/2004	Jon Kevin Anderson	010032-000100US	5008
37490	7590	01/03/2006	EXAMINER	
CARPENTER & KULAS, LLP 1900 EMBARCADERO ROAD SUITE 109 PALO ALTO, CA 94303			MAHAFKEY, KELLY JO	
			ART UNIT	PAPER NUMBER
			1761	

DATE MAILED: 01/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/808,235

Applicant(s)

ANDERSON ET AL.

Examiner

Kelly Mahafkey

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 12 December 2005.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-19 is/are pending in the application.
- 4a) Of the above claim(s) 12-18 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-11, 19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: _____

Art Unit: 1761

DETAILED ACTION

without TRAVERSE

The election received 12/12/05 was received.

Claims 12-18 are withdrawn from further consideration.

Claim Rejections - 35 USC § 102

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. Claims 1-4 and 7-11 rejected under 35 U.S.C. 102(b) as being clearly anticipated by Cajigas (US 4289788).

3. Cajigas discloses of a dry food particulate or instant yoghurt composition comprising of 2-25% (at least about 3%) of a gelling agent such as gelatin (Column 4 lines 24-30 and 67-68), at least one protein such as whey protein (Column 3 lines 54-58), at least one binding agent such as starch (Column 4 lines 38-40), 10-60% (at least about 20%) sweetening agents (Column 5 lines 57-68 and Column 6 lines 1-5), 0.1-5% (at least about 0.2%) chemical gassing agent such as phosphate salts (Column 7 lines 18-24), 10-50% (at least about 0.1%) chemical reagent such as citric acid (Column 3 lines 47-58 and Column 4 lines 15-20), 10-60% (at least about 1%) bulking agent such as corn syrup (Column 5 lines 57-68 and Column 6 lines 1-5), a flavoring agent, and a coloring agent (Column 7 lines 30-50). Cajigas teaches of using 19.43% (at least about

Art Unit: 1761

10%) of one sweetening agent and 24.28% (at least about 25%) of a second sweetening agent in the Example in Column 8.

4. Claims 1, 2, 4, and 7-10 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Danforth (US 4167587).

5. Danforth discloses of a dry food particulate to add to water to make a liquid drink (Abstract and Column 3 lines 1-15) comprising of a gelling agent such as gelatin (Column 2 line 15), at least one protein such as whey protein (Column 2 line 12), 92% (at least about 1%) binding agent such as carbohydrates (Example 3 and Column 2 lines 28-31), 92% (at least about 20%) sweetening agents (Example 3 and Column 2 lines 28-31), 0.1% (at least about 0.2%) chemical gassing agent such as phosphate salts (Example 3), 1.8% (at least about 0.1%) chemical reagent such as malic acid (Example 3 and Column 2 lines 32-35), a bulking agent such as corn syrup (Column 2 lines 28-31), a flavoring agent, and a coloring agent (Example 3).

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Art Unit: 1761

7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

8. Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over Cajigas as applied to claims 1-4 and 7-11 above.

9. Cajigas discloses of a dry food particulate or instant yoghurt composition as described in paragraph 3 above. Cajigas is silent to the particulate size as less than 600um as recited in claim 19.

10. Regarding the particulate size as less than 600um as recited in claim 19, it would have been obvious to one skilled in the art at the time the invention was made to include any particle size depending on the desired organoleptic properties (i.e. texture or grittiness) of the final product (i.e. the product when mixed with a liquid or aerated).

11. Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cajigas as applied to claims 1-4 and 7-11 above and in view of Danforth.

12. Cajigas discloses of a dry food particulate or instant yoghurt composition as described in paragraph 3 above. Cajigas is silent to the specific amount of protein in the dry composition as recited in claim 5 and the ratio of proteins as recited in claim 6.

Art Unit: 1761

13. Danforth teaches that proteins are substantially soluble or capable of forming a suspension (Column 1 lines 38-45).

14. Regarding the specific amount of protein in the dry composition as recited in claim 5 and the ratio of proteins as recited in claim 6 it would have been obvious to one skilled in the art at the time the invention was made to include any amount and ratio of proteins depending on the specific consistency desired in the final product in view of Danforth. Because both references teach of the same or of a similar composition, one would have a reasonable expectation of success from the combination.

15. Claims 3, 5, 6, 11, and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Danforth as applied to claims 1, 2, 4, and 7-10 above.

16. Danforth discloses of a dry food particulate to add to water to make a liquid drink as described in paragraph 5 above. Danforth teaches that proteins are substantially soluble or capable of forming a suspension (Column 1 lines 38-45). Danforth is silent to the specific amount of protein in the dry composition as recited in claim 5, the ratio of proteins as recited in claim 6, the percentage of first and second sweeteners as recited in claim 11, and the particulate size as less than 600um as recited in claim 19.

17. Regarding the specific amount of protein in the dry composition as recited in claim 5 and the ratio of proteins as recited in claim 6 it would have been obvious to one skilled in the art at the time the invention was made to include any amount and ratio of proteins depending on the specific consistency desired in the final product in view of Danforth.

Art Unit: 1761

18. Regarding the percentage of first and second sweeteners as recited in claim 11, it would have been obvious to one skilled in the art at the time the invention was made to have included any combination and amount of sweeteners depending on the availability and desired sweetness (i.e. different sweeteners have different intensities).

19. Regarding the particulate size as less than 600um as recited in claim 19, it would have been obvious to one skilled in the art at the time the invention was made to include any particle size depending on the desired organoleptic properties (i.e. texture or grittiness) of the final product (i.e. the product when mixed with a liquid or aerated).

20. Claims 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Danforth as applied to claims 1, 2, 4, and 7-10 above and in view of Moore (US 4120987).

21. Danforth discloses of a dry food particulate to add to water to make a liquid drink as described in paragraph 5 above. Danforth is silent to the specific amount of gelling agent as recited in claim 3.

22. Moore discloses that gelatin affects the elasticity and resilience in texture of a product (Column 1 lines 47-51). Note: Applicant states in the Specification that the composition can be used both for a dry food product as well as for an aerated confection. Moore discloses of an aerated confection whose composition, which is similar to applicants.

23. Regarding the specific amount of gelling agent as recited in claim 3, it would have been obvious to one skilled in the art at the time the invention was made to have

Art Unit: 1761

included any amount of gelatin depending on the desired elasticity and resilience of the texture of the final product in view of Moore.

Art Unit: 1761

Conclusion

24. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure:

25. US 4146652 discloses of a composition similar to applicant.

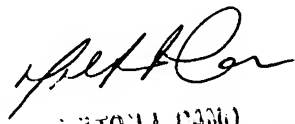
26. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Mahafkey whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

27. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

28. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



Kelly Mahafkey
Examiner
Art Unit 1761



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